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Federal Communications Commission
Office of Secretary

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Federal Communications Commission
Office of Secretary

October 4, 2004

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Re: Comments of NTS Communications, Inc.
WC Docket No. 04-313; CC Docket No. 01-338

Dear Ms. Dortch:

On behalf of NTS Communications, Inc. ("NTS"), transmitted herewith are an original and four (4) copies of NTS's comments for filing in the above-referenced dockets. Please note that the version being filed herewith has been redacted to remove confidential information pursuant to the modified Protective Order issued by the Commission on September 29, 2004, in this proceeding. NTS's confidential information will be filed under separate cover.

Please acknowledge this submission by date-stamping and returning the extra copy of this filing. Should you have any questions with respect to this matter, please do not hesitate to contact the undersigned at (202) 857-1700.

Respectfully submitted,

James U. Troup
Tony S. Lee

Counsel for NTS Communications, Inc.

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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF NTS COMMUNICATIONS

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October 4, 2004

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SUMMARY

NTS Communications, Inc. ("NTS") is a facilities-based competitive local exchange carrier ("CLEC") that operates its own facilities in seven markets located in West Texas. NTS utilizes unbundled network elements ("UNEs") to interconnect its network to SBC's copper loops obtained as UNEs, and it also utilizes UNE-P as an initial market entry strategy. The regulatory framework that will be adopted by the FCC regarding the availability of UNEs to CLECs must preserve the competitive landscape that has developed to date to prevent disruption of service to customers. It also must assure CLECs access to bottleneck facilities to avoid making it uneconomic to continue to provide service or enter new markets, especially considering the billions of dollars that CLECs have already invested to compete with the incumbent local exchange carriers ("ILECs").

Any framework developed by the FCC to determine which network elements must be made available to competitors requires a market-based fact-specific analysis for each element. The appropriate framework for such an inquiry should be whether a reasonably efficient CLEC can offer competitively priced telephone, data, and advanced services to the business and residential public in a designated market without cost-based access to a given ILEC network element. If a CLEC would suffer significant technical, operational, or financial impairment without access to a given network element in a particular market, then the FCC must conclude that that element must be offered to CLECs as a UNE under Section 251(c)(3). As part of its inquiry, the FCC should examine whether a network element is available from at least two providers other than the ILEC at a competitive wholesale price.

The relevant market for conducting the Commission's Section 251(c)(3) impairment analysis should be the market defined by wire center boundaries, because wire centers are well

defined and have been used by the FCC in other proceedings to determine such important issues as universal service funding levels. The wire center boundary approach is specific enough to satisfy the granularity requirement established by the USTA I court.

The Commission may utilize third parties for purposes of fact finding or seeking advice, provided, however, that the FCC makes the ultimate decision regarding which UNEs should be available to CLECs. While it would be best practices for the FCC to undertake the necessary gathering and analysis of the facts itself, given the granularity of the markets required to determine the availability of UNEs, this task is too large for the Commission to conduct on its own. Thus, the FCC should engage the assistance of the state utility commissions, and ask them to report back to the Commission regarding the competitive landscape in each market for each UNE. If a state commission declines to provide such assistance, then the Commission could then directly assume the investigation for that state. A periodic review should be conducted every four years to analyze market changes that have occurred since the initial UNE review.

With regard to intermodal competition, none of the suggested alternatives (e.g., voice over IP, cable television plant, or wireless service) can currently replicate the quality, reliability, or ubiquity of traditional wireline ILEC facilities. They each have shortcomings that cause them to be inappropriate or inapplicable replacements for ILEC UNE offerings. Accordingly, those "alternatives" should not be taken into consideration in determining whether a network element should be made available as a UNE.

It will require a significant amount of time to conduct the appropriate inquiry and analysis to arrive at a list of UNEs that will be made available in each market in the country. In the event that the Court of Appeals vacates the FCC's transitional UNE rules, the FCC should take actions to exercise its authority in other areas to preserve the status quo until the

Commission can adopt permanent UNE rules. Such actions could include mandating tariff filings that contain network elements at rates no greater than FCC prescribed maximums, and/or transitional national wholesale discounts for resale that maintain the minimum gross margins required for a CLEC to continue to operate.

The UNE proceeding raises the issue of the interplay between Sections 251 and 271. While the unbundling requirements contained in each section are duplicative in some respects, they address two very different market conditions. Section 251 was designed to require access to ILEC UNEs in a non-competitive market, whereas Section 271 was intended to address bare minimum and non-negotiable ILEC unbundling obligations. Thus, Congress intended for the Commission to use its discretion under Section 251(c)(3) to go well beyond those elements specifically set forth in Sections 251 and 271, and establish broad unbundling requirements after appropriate inquiry and investigation to foster competition.

There has been significant controversy regarding the use of UNE-P as a method of promoting competition. However, UNE-P does have application as a valid and viable market entry strategy. In order to address the need to have UNE-P available for new market entrants, and also to encourage competition through facilities-based services, NTS proposes that UNE-P continue to be available as a UNE, but that UNE-P be limited to market entry uses only. Specifically, NTS proposes that the Commission allow a CLEC to use UNE-P to compete for market share until such time as the CLEC has acquired 500 local dial tone lines within a given ILEC end office. After the 500 line threshold is reached, the CLEC would be required to construct collocation facilities and deploy such end office equipment as required to provide service to all of its customers served by that office, and ultimately convert its UNE-P customers to the installed facilities.

NTS provides information to the Commission regarding the markets NTS serves in support of its position that interoffice dark fiber, high capacity loops, and interoffice transport should continue to be available as UNEs during the transition period and also through the FCC's permanent UNE rules. The information demonstrates that the ILEC is the only available provider capable of delivering the network elements NTS needs to provide high quality and advanced telecommunications capabilities to the public. The data further demonstrates that it would be uneconomic for NTS to duplicate the ILEC's facilities given the market size and high costs involved.

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Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF NTS COMMUNICATIONS

NTS Communications, Inc. ("NTS"), by its attorneys, hereby submits its comments and proposals related to issues raised by the Commission in the above proceedings.[1]

I. INTRODUCTION

Although it has been operating as a common carrier since 1982, NTS is probably not well known to the Commission. In the past NTS has, in an effort to control costs, jointly filed comments with its trade associations and other parties on Commission matters. However, given the potential gravity of Commission rules potentially emanating from this proceeding and the uniqueness of NTS's facilities-based local dial tone and data services business plan and market position,[2] NTS believes that its input on this matter may prove helpful to the Commission.

The Commission has expressed its preference for the development of final rules that promote facilities-based competition.[3] As a facilities-based competitive local exchange carrier ("CLEC"), NTS is especially qualified to comment in this matter and has attempted to address

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[1] *Unbundled Access to Network Elements,* Order and Notice of Proposed Rulemaking, WC Docket No. 04-313, FCC 04-179, 2004 FCC LEXIS 4717 (2004) [hereinafter "*NPRM*"].

[2] For an Overview of NTS's facilities-based CLEC business please see attached Exhibit "A", which is incorporated into these Comments by reference.

[3] *NPRM* ¶ 2.

those issues that, if decided incorrectly, will cause substantial harm to the operation of a facilities-based CLEC.

II. AN APPROPRIATE FRAMEWORK TO PROMOTE FACILITIES-BASED COMPETITION

Any framework that is developed by the Commission must balance the needs of investors and consumers of all stripes, both CLEC and incumbent local exchange carrier ("LEC"), be workable under the law and preserve the core of the competitive landscape that has developed to date. The fate of millions of business and residential customers who have made a competitive choice, and the multi-billion dollar economic consequences of such choice, hinge on getting this framework right.

A. An Investigation Into the Facts Of Each Market Is Needed

Given the mandate of *USTA I*, any framework developed by the Commission for determining which bottleneck unbundled network elements ("UNE") must be made available to competitors needs to involve a market-based fact-specific analysis of each UNE at issue.[4] Under *USTA II*, it is equally clear that the Commission, and not a designated third party, must make the final 47 U.S.C. § 251(c)(3) unbundling decision for each specific UNE.[5] Given these requirements, it seems obvious that a significant fact-finding investigation be undertaken, on a market-by-market basis, prior to the Commission's long-term determination as to which UNEs must be made available in a given market. Moreover, this long-term determination should be reviewed periodically to determine if market forces have changed the competitive landscape within a given geographic market since the time when the last determination was made.

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4 *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

5 *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

The Commission asked for comment on how its unbundling framework should be changed in light of the guidance provided by the Court in *USTA II*.[6] The Court in *USTA II* did not reject the Commission's definition of impairment based on operational and entry barriers that make entry into a market uneconomic. Instead, it held that "the Order's interpretation of impairment is an improvement over the Commission's past efforts in that, for the most part, the Commission explicitly and plausibly connects factors to consider in the impairment inquiry to natural monopoly characteristics... or at least connects them (in logic that the ILECS do not seem to contest) to other structural impediments to competitive supply."[7] However, recognizing that Congress made a distinction between the "necessary" standard in 47 U.S.C. § 251(d)(2)(A) and the "impair" standard in 47 U.S.C. § 251(d)(2)(B), the Court also concluded that the Commission could adopt an impairment standard that "reaches beyond natural monopoly" and the essential facilities doctrine.[8]

The Court did fault the Commission's definition of impairment for not identifying for whom the lack of UNEs would make market entry uneconomic.[9] The Commission can cure this deficiency by clarifying that UNEs must be made available to overcome operational and entry barriers that make it uneconomic for a reasonably efficient CLEC to enter a market or continue to provide service to a market.

To avoid further uncertainty in the courts, the Commission's analysis should begin with an application of the "necessary" standard "by hewing rather closely to natural monopoly features".[10] This approach will enable the Commission to establish a foundation upon which it

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6 *NPRM*, ¶ 9.

7 *USTA II*, 359 F. 3d at 571-572.

8 *Id.* at 572.

9 *Id.*

10 *Id.*

can build its impairment analysis and will produce a list of critical UNEs over which there should be little debate. Then the Commission can add UNEs to that list after completing its market specific analysis of operational and entry barriers that make it uneconomic for a reasonably efficient CLEC to enter a market or continue to provide service in a market.

In applying the "necessary" standard, the Commission's determinations under § 251(c)(3) must at a minimum make UNEs available for essential bottleneck facilities that a CLEC cannot reasonably reproduce and that therefore are covered by the essential facilities doctrine.[11] During MCI's antitrust lawsuit against AT&T, the Court concluded that most of the ILEC's local distribution facilities satisfy the criteria of "essential facilities".

> The facilities in question met the criteria of "essential facilities" in that MCI could not duplicate Bell's local facilities. Given present technology, local telephone service is generally regarded as a natural monopoly and is regulated as such. It would not be economically feasible for MCI to duplicate Bell's local distribution facilities (involving millions of miles of cable and line to individual homes and businesses).[12]

When a bottleneck facility necessary for a facilities-based CLEC to operate is found in a given market, it is absolutely imperative that the Commission order this facility be made available to competitors under a cost-based pricing scenario. Without such a requirement, the ILEC in control of the bottleneck facility has no incentive to make the facility available to competitors at all – much less at a cost-based price.

Failure to mandate cost-based availability of such facilities to competitors results in either (1) the ILEC setting the price so high as to preclude economic market entry,[13] or (2) the ILEC

[11] *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir. 1983).
[12] *Id.*
[13] *Sprint Communications Co. v. FCC*, 274 F.3d 549, 555(D.C. Cir. 2001) (holding that, because the Communications Act aims to stimulate competition, the FCC's public interest analysis requires the consideration of potential price squeezes).

simply denying access to this facility altogether.[14] Under either scenario, economic barriers to entry become so high that no competition, facilities or non-facilities, is able to succeed. Sadly, with respect to the local dial tone and data markets that NTS serves on a facilities basis,[15] the reality is that the ILEC continues to exert tight-fisted monopoly control over most, if not all, of the bottleneck facilities which enable facilities-based competitors to offer a choice to the public.

Given the foregoing legal and factual realities, NTS suggests that an appropriate framework on a going forward basis would be for the Commission to commence a fact-specific inquiry into each market asking a fundamental question. That is, "Can a reasonably efficient CLEC offer competitively priced telephone, data and advanced services to the business and residential public in a designated wire center without cost-based access to a given ILEC network element?" If the answer to this question is that in the absence of a given UNE competitors would suffer significant[16] technical, operational, or financial impairment[17] without access to it, then the Commission must conclude that the element shall be offered to CLECs under Section 251(c)(3) with respect to the market in question.

In conducting the foregoing factual analysis, the Commission should foremost examine whether or not a CLEC can purchase a given network element in a stated market from at least two providers other than the ILEC at a competitive wholesale price. If so, then it should not be necessary for the ILEC to offer that network element to CLECs under Section 251(c)(3). This

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[14] Unfortunately, both of these scenarios have been observed by NTS in the industry-wide process of trying to reach negotiated agreements with SBC since the Commission's call that the parties come together to reach a resolution to the current situation.

[15] As noted in the attached Exhibit "A", these markets are Abilene, Amarillo, Lubbock, Midland, Odessa, Pampa, Plainview and Wichita Falls, Texas.

[16] As used in this context, "significant" is properly defined as "of a noticeably or measurably large amount". See *Merriam-Webster's Collegiate Dictionary* 1159 (11th ed. 2003).

[17] NTS points out that in its experience, a reasonably efficient facilities-based CLEC must be able to generate operating gross margins of at least forty percent in order to survive and continue to operate.

result obtains because free market dynamics should act to set an appropriate wholesale price for a given network element with a total of three or more providers (including the ILEC) competing for business. This would not be the case with only the ILEC plus one additional wholesale provider because a duopoly is simply not sufficiently competitive to allow market dynamics to set truly competitive prices for a given network element.[18]

B. <u>The Commission's Rules Should Encourage Creation of Wholesale UNE Markets</u>

Some may argue that requiring Section 251(c)(3) unbundling effectively prevents the creation of competitive wholesale markets because it sets an artificially low wholesale price against which competition must take place. NTS's experience is that this argument simply does not hold water in the real world for the vast majority of UNEs. The reality is that CLECs of all types (including NTS) would like nothing more than to escape their reliance on their primary competitor, the ILEC, to provide service to their customers. Such an escape from ILEC reliance comes with the added benefit of avoiding the regulatory uncertainty that has dogged the industry since its inception.

The undeniable law of market dynamics is that, given time, where there is demand, supply is sure to follow.[19] This basic law of market forces, however, does not apply when, as is the case with UNEs, there is only one supplier of an input necessary to provide a product (or in this case, a service) to the public.[20] In markets characterized by monopolies (like the wholesale UNE market) excess profit is realized by the monopoly provider and purchasers receive a lower

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[18] *Proposed Final Judgment and Competitive Impact Statement; United States of America v. AT&T Corp. and McCaw Cellular Communications, Inc.*, 59 Fed. Reg. 44158 (1994) (Department of Justice finding that duopoly markets evidence "an absence of significant price competition").

[19] Tom Gorman, *The Complete Idiot's Guide To Economics*, (2003).

[20] *Id.* at 130.

quantity of the product than would be the case in a competitive market.[21] Thus, the Commission's rules should strongly encourage development of robustly competitive wholesale markets for UNEs.

NTS has been in talks with several resale/UNE-P based CLECs to offer UNEs such as mass market switching, loop capacity, and end-user broadband services on a wholesale basis in its facilities-based markets. Not only is NTS willing to lease its facilities-based network elements to other CLECs, it is anxious to do so because the additional revenue from these wholesale purchasers works to significantly help NTS recover the sunk costs it has already incurred to provide services to its own customers. Were the Commission in this proceeding to develop rules which effectively eliminated the ability of these resale/UNE-P carriers to survive, demand for the wholesale supply NTS is attempting to deliver would surely dry up and, thus, no wholesale markets will develop to compete with the ILEC. Conversely, if the Commission develops rules in this proceeding that have the effect of preventing a facilities-based CLEC like NTS from meeting this requested demand, no wholesale markets will develop to compete with the ILEC. Either way, the ILEC is left with bottleneck control of essential network elements and facilities-based competition goes nowhere - forever. The Commission must not allow this result to occur.

C. <u>What is a "Market" For Section 251 Determinations?</u>

There is no need to "reinvent the wheel" in determining what a relevant "market" should be in conducting an impairment analysis under Section 251. A "market" for impairment analysis purposes should be defined as the "wire center for a given metropolitan or rural area".

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[21] *Id.* at 131.

Wire centers are "common or normal demarcations for provision of service."[22] Wire centers are well defined and have been in use for many years to determine such important issues as universal service fund disaggregation and pricing flexibility for interstate access charges. See e.g., 47 C.F.R. §§ 54.315, 69.709. Moreover, a wire center centric approach should be specific enough to satisfy the *USTA I* granularity requirement.

Just as important, it is a rational way to look at local markets because every local access line that can be served within a given local exchange area is linked to the public switched telephone network via one or more ILEC end offices serving a given local exchange. These end offices or end office/tandems can (and do today) serve as the most logical interconnection points at which facilities-based CLECs may establish their collocations. It is through these very collocations that facilities-based CLECs gain access to those network elements necessary to offer voice, data, video and advanced services to the public.

Moreover, a wire center definition of "market" is the way that potential facilities-based CLECs analyze the feasibility of constructing competing plant and installing competitive equipment. This is the case because, for example, economic conditions are generally very similar across the entirety of a given wire center, access line counts are readily available, marketplace demographics are normally easily obtainable, there exists a community of interest within the area, a wire center is often served by common media outlets, and existing service providers, competitive and incumbent, are clearly defined across the area encompassed by the wire center.

Such a definition of "market" is also a good idea because a wire center is small enough that it will aid in the development of facilities-based competitive choices for as many Americans as possible. Using a more expansive definition of "market" (such as an MSA or RSA), one

[22] *MCI Communications Corp. v. AT&T*, 708 F.2d at 1146.

could very well envision a scenario in which a smaller non-competitive wire center sits adjacent to a robustly competitive wire center and the smaller wire center gets caught up in a "non-impairment" finding for a "market" definition that encompassed both the large and small wire centers. In allowing density zones for pricing interstate access services and federal universal service fund support, the Commission has determined that wire centers within the same study area should be treated as different markets. A "market" definition more expansive than the wire center would in all likelihood doom consumers in the smaller wire center to a perpetual lack of choice for local dial tone, data and other advanced services. This outcome would run counter to the whole purpose and intent of the 1996 Act.

Defining "market" as a wire center is also helpful in tracking the future course of competition. ILECs and CLECs have become accustomed to providing data to both state and federal regulatory agencies for a given wire center. Thus, the forward looking costs of monitoring competitive developments on a wire center basis should be minimal. Existing reporting systems are already in place, or could be easily developed, to report items such as line counts, participation in low income programs, capital plant costs, route and loop deployment, service disruptions, broadband deployment, competitive analysis, and the like.

Moreover, a wire center definition of "market" enables both small and large CLECs to compete because initial capital costs to build competing facilities (while large), are not so onerous that competition will be frozen out. Such a definition should have the added benefit of bringing more competition to smaller wire centers which to date, have been mostly overlooked due to lower economies of scale. Surely it was not contemplated by the drafters of the 1996 Act that the benefits flowing from competition should be limited to those Americans living near only the largest wire centers in the country.

D. <u>Who Should Conduct The Factual Investigation For Each Market?</u>

In the Triennial Review Order,[23] the Commission delegated to the various state commissions the effective authority to determine which UNEs should be available under Section 251(c)(3). Given the court's holding in *USTA II*, the Commission may not delegate its decision-making to the states. However, just as clearly, the *USTA II* court indicated that the Commission may look to a third party for "fact finding" or for "advice giving" provided that the Commission makes the final decision.[24] Thus, it would seem permissible for the Commission to utilize the informed input of outside third parties in gathering facts and in getting advise to inform its decisions in this matter.

While it would probably be a "best practice" for the Commission to undertake the entirety of the required factual gatherings itself, given the Commission's stretched resources, the examination of every UNE in every market in the country would appear to be too large a job for the Commission to conduct solely on its own. Moreover, such an approach would likely take longer than is wise given the urgent need for regulatory certainty in the competitive telecommunications markets generally. It was, therefore, logical for the Commission to request the assistance of the state utility commissions. *NPRM*, ¶15. The FCC should ask the state commissions to report back to the Commission regarding what the competitive facts are in each market for each UNE. Such factual reports could also presumably contain a recommendation (if a state commission wished to give it) as to whether or not a specified UNE in a given market was sufficiently competitive to warrant a removal from unbundling requirements under Section

[23] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003); Errata, 18 FCC Rcd 19020 (2003) ("*TRO*").

[24] *USTA II*, 359 F.3d at 566-567.

251(c)(3). The Commission would be free to give such weight to a state's recommendation (if given) as it deemed appropriate in the prudent exercise of its regulatory authority.

In the event that a state commission did not wish to undertake the requested factual assessments, then the Commission could directly assume the fact gathering relevant to that state. NTS's view is that the vast majority, if not all, state commissions would welcome such a request from the Commission and would do their best to accommodate the Commission's fact gathering needs in this regard. State commissions engage in assessing the facts of competition on a regular basis.[25] In any event, this initial fact gathering process would help establish a baseline of available UNEs by market from which Commission determinations could be made.

In order to address changes in market conditions over time, it seems necessary for the Commission to conduct additional factual reviews on a regular basis. These additional reviews should be conducted every four years,[26] and could be conducted by the Commission using its own resources, or the Commission could enlist the aide of state commissions. Effectively, these subsequent reviews would analyze changes from the baseline Section 251(c)(3) UNE list on a market-by-market basis and would serve as a platform to add or subtract necessary UNEs as competitive conditions warrant.

E. <u>Some Thoughts About Intermodal Competition</u>

It is understood that the Commission should examine the effect of intermodal competition. However, some have suggested that Voice over Internet Protocol ("VOIP") using cable television ("CATV") plant or cell phones are an effective substitute for wireline voice and/or data services. This position ignores the fact that neither CATV VOIP nor cell phones can

[25] For example, the Texas Public Utility Commission engages in regular fact-finding regarding competition within the state and issues a bi-annual Scope of Competition Report to the Texas Legislature.

[26] Anything less than three years is too short a time to see any significant market changes, and any period exceeding five years would not capture market dynamics rapidly enough to reflect reality.

come close to replicating the quality, reliability, nor ubiquity of the traditional wireline ILEC embedded plant. It is common knowledge that cell phones regularly drop calls and have distorted quality in many areas – both rural and urban. The same criticism simply cannot be leveled at wireline phone service.

With respect to data services, cell phones cannot achieve anything close to the 20+ Mbs capacity of current DSL technology (ADSL2+) and cable modems cannot guarantee any stated bandwidth. This arises from cable modem use of shared access Ethernet technology. DSL can and does guarantee bandwidth to customers. CATV plant is also not as ubiquitous as many commentators might suggest given build-out requirements that generally only require plant to be built-out where density equals or exceeds 40 homes per 1 mile of cable. The more rural an area is, the more of an issue ubiquitous service becomes. Conversely, in the name of universal service, wireline telephone plant has been built to every nook and cranny of the country, regardless of population density or the number of establishments passed.

Moreover, neither VOIP over CATV plant nor cell phones can currently replace the role of 911 emergency assistance or CALEA compliance now offered by wireline telephone service. Recent experience also demonstrates that CATV VOIP and cell phones have either wireless interference issues or are unable to continue to provide service without commercial electric power during a terrorist attack or natural disaster. One could argue that the lack of CALEA compliance when using VOIP presents such a significant national security concern in the "Post 911 World" that this issue should properly occupy the minds of government officials at the highest levels until a final and impregnable solution is reached. NTS does not wish to belabor this point, but it does note that VOIP security is an issue that needs to be resolved before the widespread use of VOIP is allowed to compromise the safety of the American public.

Additionally, most large-scale VOIP deployments are targeted at a single market element – the residential consumer. This technology is simply "not ready for prime time" when it comes to serving even small business customers, not only for reasons stemming from coverage areas, but also because of the complexity arising from the needs of business users. These requirements, such as the need for PRI interfaces, are discussed more thoroughly in Section V of these comments. There will come a day when VOIP does play a major role in serving business customers, but neither the technology nor the industry is there yet.

F. <u>The Status Quo Must Be Maintained in the Interim Period if the FCC's Transitional UNE Rules are Vacated</u>

Obviously, it will take a significant amount of time to arrive at a list of Section 251(c)(3) network elements for each market in the country. The FCC's transitional UNE rules are designed to preserve the benefits of competition offered by today's CLECs until a final list of market-based UNEs is determined by the Commission.[27] However, several ILECs have asked the Court of Appeals to vacate those transitional UNE rules. Should the Court vacate the transitional UNE rules, the Commission should exercise other areas of its authority to preserve the status quo until it has had sufficient time to adopt permanent UNE rules.

For example, the Commission could exercise its authority under 47 U.S.C. § 203 to require ILECs to offer through their tariffs replacements for network elements, such as dark fiber, that ILECs have refused to include in their tariffs. Pursuant to its authority under 47 U.S.C.§§ 201 and 205, the Commission could prescribe maximum rates for those transitional UNE replacement services based on TELRIC. Similar transitional rate structures have been upheld on appeal to prevent market disruptions pending broader reform.[28]

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[27] *NPRM*, ¶ 21.
[28] *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002)

The Commission could also exercise its authority under 47 U.S.C. § 201 and 251(c)(4) and (d) to prescribe a transitional national wholesale discount for resale. The Supreme Court held that it was the resale provisions of the 1996 Act that were intended to maximize sharing of ILEC networks.[29] The wholesale discount should be set at a level that maintains the gross margins of at least forty percent needed to sustain competition during the short time period that the Commission requires to complete its adoption of permanent UNE rules. To maintain this critical gross margin during the transition period, the Commission could temporarily permit CLECs relying on such resale to bill terminating access charges to interexchange carriers ("IXCs") in lieu of the ILECs, and preclude the ILECs from assessing originating access charges on such CLECs.

III. THE INTERPLAY BETWEEN SECTIONS 251 AND 271

Although the unbundling requirements contained in each section are duplicative in some ways, Sections 251 and 271 were incorporated into the 1996 Act to address two very distinct market conditions – non-competitive and competitive.

Section 251, especially Section 251(c)(3), was designed to require access to ILEC UNEs in non-competitive markets. It was enacted to pry open bottleneck facilities owned by monopolistic providers who would be forced to let others use these very bottleneck facilities to compete against the monopolist who owned the facility in the first place. The monopolist certainly has no incentive to give up control of its market power and, in fact, has every reason to preserve its market position. Thus, it seems clear that Congress left broad discretion to the Commission in interpreting Section 251(c)(3) for the purpose of opening up access to these bottleneck facilities after the Commission carefully examined precisely what would be required to spur competition. This discretion was required because it was not readily apparent at the time

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[29] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 430 (1999).

the statute was written exactly what specific network elements would be required in order to create competition in a theretofore single-provider marketplace. Unfortunately, it has been the exercise of this broad discretionary authority that has come under such remarkable criticism by the courts.

In contrast, Section 271 contemplated something different. Congress incorporated very precise unbundling requirements into Section 271 because its provisions were intended to address <u>bare minimum and non-negotiable</u> ILEC unbundling obligations. These obligations (as well as those expressly set forth in Section 251) exist on a perpetual basis regardless of the competitive landscape of a given market. Accordingly, the discretion that Congress so broadly and specifically conferred upon the Commission in determining Section 251 unbundling requirements was generally not as broadly granted under Section 271.

Thus, a fair reading of the entirety of both sections seems to indicate that Congress intended for the Commission to use its discretion under Section 251(c)(3) to go well beyond those elements specifically enumerated in Sections 251 and 271. After competition (preferably facilities-based competition) has a chance to take root, become firmly established and self-sustaining, the broad unbundling requirements of Section 251(c)(3) might gradually be phased out as no longer necessary to support competition. Thus, after the additional unbundling requirements of Section 251(c)(3) had run their course, the industry would be left with the <u>bare minimum</u> requirements stated in both Sections 251 and 271.

A primary question before the Commission in this proceeding is whether or not facilities-based competition has become so firmly entrenched that it can survive in the absence of Section 251(c)(3) unbundling obligations. This determination can only be made after a factual investigation of each UNE in each market. NTS is certain that the answer is a definitive "no" in its own facilities-based markets, and suspects that this is the case for most UNEs in the vast majority of markets that the Commission will examine.

Unbundling requirements simply have not been given sufficient time to create the kind of robust facilities-based competition that is necessary before the industry moves beyond the permissive mandate of Section 251(c)(3). This result is not particularly surprising given eight years of court challenges, regulatory uncertainty, and various tactics by the ILEC community to roll back attempted competition at every turn. Even in a perfect regulatory world allowing a guaranteed rate of return, unlimited access to capital, and no competition whatsoever, it took the ILECs (according to their TV commercials) more than one hundred twenty five years to build out their networks. To suggest (in a world filled with regulatory uncertainty, an absence of guaranteed return on investment, and combative ILEC suppliers) that robust competition could become self-sufficient and sustainable without Commission assistance in a mere eight years is simply expecting too much of any new industry.

IV. A PROPOSAL RELATING TO MASS MARKET SWITCHING A/K/A UNE-P

Given the contentious history of the UNE-P method of fostering competition, NTS has thought that a compromise on this issue may be possible if the use of UNE-P were somehow limited. It is in the spirit of reaching such a resolution that NTS respectfully submits the following proposal for consideration by the Commission.

A. <u>NTS Has Historically Used Total Service Resale and UNE-P as Market Entry Methods</u>

NTS has used both "Total Service Resale" ("TSR") and what is generally called "UNE-P" in Southwestern Bell Telephone's ("SBC") Texas territories as a limited market entry strategy.[30] The theory behind this practice is that once a "critical mass" of customers is using NTS as their chosen local dial tone carrier within a given market, NTS can then afford to invest in facilities deployment within the market in question with some degree of confidence that capital outlays will not be wasted. After achieving this "critical mass" of customers in a market, NTS has moved to aggressively deploy its own facilities based services, and then convert its previously established customer base to these newly deployed facilities. To date, this strategy has for the most part been successful.

B. Total Service Resale Is No Longer an Effective Competitive Strategy

The initial problem with TSR has always been that the discounts offered by the ILECs have been so small that a long term business case using this method is not economic.[31] However, it was acceptable as a limited use method for initial market entry – at least until the ILEC received long distance approval. Now, for the reasons stated below, this mechanism is simply no longer feasible even as a market entry strategy.

In Texas, it is a marketplace reality that it is necessary to bundle, at a minimum, long distance with local dial tone services as a package in order to compete for both business and residential customers. Failure to do so renders any service offered non-competitive in the extreme. Due to this bundling requirement, TSR is not a cost effective market entry strategy because the TSR carrier is assessed originating long distance access charges by the ILEC, and the TSR carrier is unable to collect access charges from other IXCs for terminating access. Because of these factors, any service offering using TSR is "blown away" by competing ILEC

[30] NTS operates as a CLEC only in Texas and, thus, is only able to use Texas examples. We believe, however, that these examples are generally applicable to other states as well.

[31] In Texas, the resale discount has been 21.6% since the rate was first established quite a few years ago. It has generally been necessary to pass at least a 5% to 10% savings along to the customer in order to win business. This leaves the TSR carrier with a gross margin ranging from 11.6% to 15.6%; far short of what is necessary to operate a surviving CLEC.